No. 16,014

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ASHBY O. STEWART, Executor of the Last Will and Testament of Mary W. Stewart, Deceased,
Appellee.

On Appeal from the Judgment of the United States District Court for the Northern District of California.

BRIEF FOR THE APPELLANT.

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INDEX

Table of Authorities Cited

Statutes

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OPINION BELOW.

The opinion of the District Court (R. 34-49) is reported at 158 F. Supp. 25.

JURISDICTION.

This appeal involves federal estate taxes. The taxes in dispute plus interest in the total amount of $222,357.11 were paid on or about August 24, 1954. (R. 55.) Claim for refund was filed on or about

March 10, 1955 (R. 15-19), and the Commissioner of Internal Revenue rejected the claim on March 21, 1956 (R. 8, 10, 21, 23). Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and on July 3, 1956, the taxpayer brought an action in the District Court for recovery of the taxes paid. (R. 3-19.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. The judgment was entered on March 17, 1958. (R. 56-57.) Within sixty days and on May 2, 1958, a notice of appeal was filed. (R. 58.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED.

1. Whether the court below erred in holding that no part of the value of insurance held in the name of decedent's husband was includible in her gross estate where such insurance was community property of the decedent and her husband.

2. Whether the court below erred in holding five annuity policies held by the wife in her own name to be community property, only one-half of which was includible in her gross estate, in view of the statutory presumption that personal property acquired by a married woman by an instrument in writing is her separate property and also in view of the fact that the husband had knowledge of all and specifically acquiesced in three written requests that he be replaced by someone else as primary beneficiary of the policies.

STATUTES INVOLVED.

These appear in Appendix A, *infra.*

STATEMENT.

This is an action brought by the executor of the estate of Mary W. Stewart to recover federal estate taxes. The case was tried entirely on the pleadings and a written stipulation of facts. (R. 34.)

Ashby and Mary Stewart were married in 1906 and their marital relationship continued until Mary's death on February 21, 1951. At all times pertinent to this case they were residents of California. This action concerns the includibility in Mrs. Stewart's estate of various insurance and annuity policies. (R. 25, 34-35.)

There were twenty-six insurance policies insuring the surviving husband, Mr. Stewart. (Ex. G.) Each of these policies was procured after the marriage of Mr. and Mrs. Stewart, and it is stipulated all premiums were paid with community property funds.[1] The policies therefore were community property. (R. 45.) They may be divided into three categories.

The first group consists of thirteen policies of twenty payment life insurance fully paid. (Exs. H, I, J, K and L.) The decedent is designated the pri-

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[1]There is no problem present concerning the includibility of pre-1927 community property. The amount which the Commissioner included in the return was one-half of the portion of the cash surrender value which was attributable to premiums paid out of post-1927 community property funds. (R. 9, 18, 23, 29-30; Ex. G.)

mary beneficiary in twelve of these policies and her daughter is primary beneficiary of the other. As to ten policies wherein decedent was primary beneficiary the husband subsequently changed the mode of settlement of the contract in the event of his death and named contingent beneficiaries should his wife not survive the receipt of all of the payments thereunder. These requests for change were endorsed by decedent. (Exs. H, I, K.) However, there is no indication of any similar endorsement by decedent on the other two policies in which she was named primary beneficiary (Exs. J, L), nor is there any such written concurrence in the naming of her daughter as primary beneficiary of one of the policies (Equitable, No. 2796071). In each policy in this group the husband retained the right to change beneficiaries.

The second group is comprised of eight twenty-year deferred annuity contracts. In each of these eight contracts decedent is designated the primary beneficiary. (Exs. M, N, O, P, Q.) Decedent endorsed change requests in connection with five of these policies. (Exs. M, O, P, Q.) There were no such endorsements in connection with the remaining three policies. (Exs. M, policy No. 9577482; N.) The husband had the right to change beneficiaries in only two of these policies. (Ex. M.)

The last group consists of five ordinary life insurance policies. (Exs. R, S, T.) The daughter was named primary beneficiary of three of the policies (Exs. R, S), one so designated the granddaughter (Aetna No. 778051) and the decedent was primary

beneficiary of the last policy (Ex. T). There is no record of written endorsements of any sort by decedent on either those policies naming her daughter or granddaughter as primary beneficiaries nor on that in which she was named primary beneficiary. The right to change beneficiaries was retained by the husband in each of these five policies.

The court below held that no part of the value of any of the above twenty-six policies was includible in decedent's gross estate (R. 55), and from this determination the United States here appeals (R. 63).

In 1934 and 1935 Mrs. Stewart was issued seven annuity policies and the premiums for each were paid with community funds. Each provided for the payment of monthly sums to her for life, beginning when she reached a designated age. These policies originally provided that in the event of her death prior to the payment of any annuities or before the amount paid in had been returned, payment was to be made to certain named beneficiaries. (Exs. B, C, D, E, F.) These policies may be separated into four groups: the Fidelity policies, the Hancock policies, the Equitable policy and the Aetna policies. (R. 36, 40.)

Fidelity policies. Originally, Mrs. Stewart designated her husband as the primary beneficiary and her daughter and grandchildren as the contingent beneficiaries. In 1948, at Mrs. Stewart's request, the insurance company eliminated her husband as the primary beneficiary and substituted her daughter. The grandchildren continued to be contingent beneficiaries. There was no consent or acknowledgment by Mr. Stew-

art to this change of beneficiary. In December, 1950, pursuant to an option given her in the policies, Mrs. Stewart elected to take payment of the total amount of the policies in 240 equal monthely installments in lieu of the annuity provisions contingent on her life. On Mrs. Stewart's death the balance of the payments not theretofore made to her was to be made to her daughter, and in the event of the daughter's death before all payments had been received, the grandchildren were to receive the balance of the payments. At about the same time as this election, Mr. Stewart signed a statement addressed to the insurance company in which he relinquished all his community rights in these policies. (R. 36-37.) The court below held that all of the proceeds of the Fidelity policies are includible in Mrs. Stewart's gross estate as her separate property (R. 44, 52-54), and this matter is no longer in controversy.

Hancock policies. Mr. Stewart was designated as the primary beneficiary at the time of issuance of these policies. In 1945 Mrs. Stewart changed the mode of settlement of the policies and Mr. Stewart joined in her request for this change by signing the form under which the change was requested. In 1948 Mrs. Stewart excluded her husband as the beneficiary and named her daughter as the primary beneficiary and her grandchildren as contingent beneficiaries. Mr. Stewart joined in this requested change in the same manner in which he joined in the 1945 change. A few months prior to Mrs. Stewart's death in 1951, she notified the company of her election to

take payment of a designated sum for 240 months certain and relinquished her right to take payments contingent on her life. Her daughter was to receive these payments in the event of Mrs. Stewart's death prior to the expiration of the 240 months, and payment was to the made to the grandchildren in the event the daughter did not survive this period. (R. 37-38.)

Equitable policy. Here, too, Mr. Stewart was the primary beneficiary at the time the policy was issued. In 1948 Mrs. Stewart eliminated her husband as primary beneficiary. Mr. Stewart joined in this request for a change of beneficiaries by signing his name beneath a line on the request form which read as follows: "I hereby agree to the foregoing beneficiary provisions. Signature of Annuitant's husband." In December, 1950, Mrs. Stewart exercised the option given to her in the policy to receive a designated monthly sum for 240 months in lieu of her right to receive an annuity contingent on her life. This change in the mode of settlement provided that if she died before receiving all of the 240 payments, her daughter was to be the recipient and if the daughter did not survive this period payment was to be made to the grandchildren. (R. 38-39.)

Aetna policies. Mr. Stewart was primary beneficiary, with the daughter and grandchildren contingent beneficiaries. In 1948 Mrs. Stewart excluded her husband as the primary beneficiary, and substituted her daughter therefor. There is no written acknowledgment or consent by Mr. Stewart to this change, however he did sign the request form on the line pro-

vided for the signature of "Witness." In November, 1950, Mrs. Stewart changed the mode of settlement. She elected to take 240 monthly payments of a sum certain in lieu of the contingent annuity provision. Her daughter was to receive the payments if Mrs. Stewart died before she received all of the 240 payments and the grandchildren took if the daughter did not survive this period. Both Mr. and Mrs. Stewart signed the form provided by the insurance company by which the request for this change was made. (R. 39.)

In all of the above mentioned policies, Mrs. Stewart alone was described as the person having the right to name or change the beneficiary. (R. 39.) The court below held that the Hancock, Equitable, and Aetna policies were assets of the community and that they were includible in Mrs. Stewart's gross estate only to the extent of one-half of their value. (R. 41, 51-52.) From this determination the United States here appeals. (R. 63.)

STATEMENT OF POINTS TO BE URGED.

1. The District Court erred in holding that no part of community property insurance held in the name of the husband was includible in decedent's gross estate.

2. The District Court erred in failing to hold that one-half of the cash surrender value of community property insurance held in the name of the husband was includible in decedent's gross estate.

3. The District Court erred in holding that the Hancock, Aetna and Equitable policies were community property of decedent and her husband and that only one-half of their value was includible in her gross estate.

4. The District Court erred in failing to hold that all of the policies held by decedent were her separate property and that their full value was includible in her gross estate.

SUMMARY OF ARGUMENT.

1. The District Court correctly held that the twenty-six insurance policies issued to the husband were community property, however it went on to hold that they were not includible in decedent's gross estate on the theory that her interest in these policies was no more than a "right of protection" which was extinguished upon her death. This is not an accurate statement of the California law. Where the premiums on insurance policies on the life of the husband are paid from community funds, as in this case, the policies themselves are community assets, as are the proceeds at the death of the insured. A surviving spouse has been held to take a one-half interest in the proceeds of such insurance, not as a beneficiary of the policy, but as an owner of a one-half interest therein. Here we are concerned only with new-type community property, acquired after July 29, 1927. On that date, Section 161a of the Civil Code of California was enacted. That section provides that the "interests of

the husband and wife in community property * * * are present, existing and equal interests." Thus, at the time of her death the decedent had a vested one-half ownership interest in the policies which could not be taken from her without her consent. The fact that the husband is by statute given the management and control of community property in no way diminishes the wife's vested interest in such property for it is expressly provided that he cannot make a gift of the property without the written consent of the wife. This limitation has frequently been held applicable to insurance policies. Thus, where the husband without his wife's consent has made a third party a beneficiary of his insurance the gift has been held a nullity as to the wife. There is not, in this case, any written consent by the decedent which would allow the husband to make a gift of any portion of these policies. She did not give up her community rights therein. Thus, the interest of the wife in the policies is much more substantial than a "right of protection" as the lower court erroneously held. She had a vested ownership interest of one-half of the policies, extending to a clear right of testamentary disposition of such interest under the California Probate Code. As such, the policies are includible in her gross estate under Section 811(a) of the Code to the extent of her ownership interest therein. Alternatively, if it can be held that the husband's action in obtaining the insurance had the effect of making a gift on the part of the wife, either to the husband or to the beneficiaries, half of the insurance is still includible in her estate. Since

she has a right to void such a gift, her interest is includible in her estate under either Section 811(c)(1)(C) (a transfer intended to take effect in possession or enjoyment after her death) or under Section 811(d) (a transfer the enjoyment of which was subject at the date of death to revocation by the decedent). One-half of the cash surrender value of these policies is includible in decedent's gross estate and the decision below to the contrary should be reversed.

2. Since Section 164 of the Civil Code of California provides that if any personal property is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, the lower court erred in failing to hold that the annuities held by the wife in her name were the separate property of decedent wife. Such annuity interests were acquired by the decedent by an instrument in writing, and there has been no evidence whatever to rebut the presumption that they are separate property. The District Court likewise erred in failing to consider the cases holding that transfers by a husband of community property to his wife raise a prima facie presumption that he intended the transfer to be a gift. Therefore, despite the fact that the premiums on these policies were paid with community funds, they are presumptively the separate property of the wife. Alternatively, should it be held that these policies did not become the separate property of the wife at the time they were issued, it is apparent that when the husband gave his unqualified assent that he be replaced by someone else as primary beneficiary he

was giving up his community interest in the policies. At the time of such consents, therefore, the policies became the separate property of the wife. Since the policies were the separate property of the wife at the time of her death, they are includible in her estate to the extent of their full value and the decision of the lower court to the contrary should be reversed.

ARGUMENT.

I.

WHERE INSURANCE POLICIES HELD IN THE NAME OF THE SURVIVING HUSBAND ARE COMMUNITY PROPERTY, ONE-HALF OF THEIR VALUE IS INCLUDIBLE IN THE GROSS ESTATE OF DECEDENT WIFE.

The District Court held, and correctly so, that the twenty-six insurance policies held in the name of the surviving husband were community property. (R. 45.) These policies were all procured after the marriage of Mr. and Mrs. Stewart and all of the premiums thereon were paid with community funds.[2] This holding, however, did not in the opinion of the lower court compel a decision in favor of the Government's position that one-half of the cash surrender value of these policies is includible in the decedent wife's gross estate. Stating (R. 47) that "the law of the state does not provide the means by which the wife's executor can obtain possession or control of one-half of the cash surrender value of the policies," the court went on to hold that the wife's interest in the policies was

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[2]See footnote 1, *supra.*

no more than a "right of protection" and that this right was extinguished upon her death (R. 48-49). This holding, it is submitted, is not an accurate statement of the California law of community property as it relates to insurance policies purchased with community funds. Under the law of California the death of the wife did not affect the fact that she had a vested ownership interest in the policies, one-half of their cash surrender value therefore fell into her estate, and this amount properly should be included in her gross estate for federal tax purposes. In order to determine the question of includibility for estate tax purposes, the nature of the wife's interest in the policies must be considered. This is, of course, a question of local property law. *Poe v. Seaborn,* 282 U.S. 101. Therefore, the community property law of California will be determinative of the question at hand.

It is incontrovertible that the policies in question were community property. Such was the holding of the court below (R. 45) in accordance with the stipulation of the parties that "These life insurance policies were purchased by the use of community property funds of plaintiff and decedent" (R. 29.) Where the premiums on insurance policies on the life of the husband are paid from community funds, the policies themselves are community assets, as are the proceeds at the death of the insured.[3] *New York L. Ins. Co. v.*

[3]An exception has been engrafted to this general rule in the case of National Service Life Insurance policies. In *Wissner v. Wissner,* 338 U.S. 655, 661, the Supreme Court held that even though the insured's army pay, admittedly community property, had been used to pay the premiums, the wife was not entitled to one-half

Bank of Italy, 60 Cal. App. 602, 214 Pac. 61; *Travelers Ins. Co. v. Fancher,* 219 Cal. 351, 26 P. 2d 482; *Estate of Castagnola,* 68 Cal. App. 732, 230 Pac. 188; *Grimm v. Grimm,* 26 Cal. 2d 173, 157 P. 2d 841; *California Trust Co. v. Riddell,* 136 F. Supp. 7 (S.D. Cal.). See also *Union Pacific Mutual Life Ins. Co. v. Broderick,* 196 Cal. 497, 238 Pac. 1034; *Blethen v. Pacific Mut. Life Ins. Co.,* 198 Cal. 91, 243 Pac. 431; *Dixon Lumber Co. v. Peacock,* 217 Cal. 415, 19 P. 2d 233.

Under California law the surviving spouse takes a one-half interest in the proceeds of community property insurance on a decedent spouse's life, not as a beneficiary of the insurance policy, but as an owner of a one-half interest therein.[4] *Manufacturers Life Ins. Co. v. Moore,* 116 F. Supp. 171 (S.D. Cal.); *Prudential Ins. Co. of America v. Harrison,* 106 F. Supp. 419 (S.D. Cal.). Thus, the survivor receives a portion of the proceeds, not because he or she was named a beneficiary of the policy, but rather as an owner who

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of the insurance proceeds. The decision was based upon a congressional intent that the insured have complete control over the beneficiary of the insurance and that no person was to have a vested right to the proceeds. The Court recognized that the general rule as to Californians might be different: "However 'vested' her right to the proceeds of nongovernmental insurance under California law, that rule cannot apply to this insurance."

[4]These cases consider the situation of a surviving spouse, primary beneficiary of the decedent's insurance, who is guilty of manslaughter in connection with the death of the decedent. The general rule in California, as in most other states, bars a murderer from recovery of insurance on the victim's life, and the proceeds go to alternate beneficiaries if there are any. However, where the insurance has been purchased with community funds, the survivor-murderer has a vested interest in the proceeds to the extent of one-half of the surrender value of the policy.

has a vested interest in the policy. The remaining half interest in the policy was, of course, held by the other spouse at the time of death. Once it is determined that any given property has a community nature, it is necessary to determine whether it is old-type (pre-1927) or new-type (post-1927) community property. In the case at bar we are concerned only with new-type community property, acquired after July 29, 1927.[5] On that date, Section 161a of the Civil Code (Appendix A, *infra)* was enacted. This section provides that—

> The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests * * *

Thus, the decedent's interest in these policies at the time of her death was equal to that of her husband. One-half of the policies was owned by her and the other half by the husband. She had vested ownership interest which could not be taken from her without her consent. *Cooke v. Cooke,* 65 C.A. 2d 260, 150 P. 2d 514; *United States v. Malcolm,* 282 U.S. 792. There is nowhere to be found in the California cases or statutes any authority for the proposition that insurance policies and their proceeds are accorded

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[5]See footnote 1, *supra.* As noted there, it was necessary to determine the source of premium payments, whether before or after the enactment of Section 161a of the Civil Code in 1927, in order to determine the extent to which each of the various insurance policies was new-type community property. See, e.g., *Modern Woodmen of America v. Gray,* 113 Cal. App. 729, 299 Pac. 754.

treatment different from that given to any other type of property held as a community asset. In fact, the many cases cited have considered various aspects of community property law in relation to insurance and have in each instance applied the same general concepts of community property law to insurance policies as are applied to other types of property. There is no question but that at the date of her death the decedent owned one-half of every policy here in question.

Although the wife has a vested interest in the community property (Civil Code, Section 161a), it has been provided that the husband has the management and control of the community property, with the same power of disposition (other than testamentary) which he has over his separate estate (Civil Code, Section 172 (Appendix A, *infra)).* The Code expressly limits and restricts the husband's management and control however, by the provision that he cannot make a gift of the community property, or dispose of it, without a valuable consideration unless he has the written consent of his wife. This limitation upon the husband has been held applicable to insurance policies as well as to any other form of community property. Thus, where the husband without his wife's consent has made a third party a beneficiary of his insurance, and the insurance was paid with community funds, it has been held that this was an attempt to make a gift by means of insurance, and such gift was a nullity as to the wife. As a result, *New York L. Ins. Co. v. Bank of Italy, supra,* held that in such a situation upon the death of the husband the wife was entitled to one-half

the proceeds of the policy. See also *Travelers Ins. Co. v. Fancher, supra; In re Stans Estate,* Myr. Prob. 5; *In re Webb,* Myr. Prob. 93. Compare *Blethen v. Pacific Mut. Life Ins. Co., supra; Trimble v. Trimble,* 219 Cal. 340, 26 P. 2d 477. There was not, in this case, any written consent by the decedent, within the meaning of Civil Code Section 172, allowing the husband to make a gift of any portion of these insurance policies.[6] The decedent wife did not give up her rights in the policies.

The application of the provisions of Civil Code Section 172 to the situation at bar is apparent. There is no question whatsoever as to the right of the husband to insure himself with community funds. This is a privilege granted him as manager of the community. But this privilege does not in any manner allow him to defeat his wife's interest in the property purchased with community assets, for as stated above, the section goes on to provide that the husband may not give away community assets, nor may he dispose of them without adequate consideration. Thus the California courts consistently have held that in the absence of a written consent the wife takes one-half of the proceeds of insurance on her husband's life as an owner thereof and it makes no difference whom he has desig-

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[6]Compare the situation in *Ettlinger v. Connecticut General Life Ins. Co.,* 175 F. 2d 870 (C.A. 9th), where the surviving wife signed a written request changing the beneficiary of her husband's insurance to her husband's children by a prior marriage. In the case at bar, the decedent was primary beneficiary in each instance in which a consent was signed and her children or grandchildren were contingent beneficiaries.

nated as beneficiary.[7] *New York L. Ins. Co. v. Bank of Italy, supra; Travelers Ins. Co. v. Fancher, supra.* The fact that in this case the husband took the policies in his own name did not serve to alter their community status in any respect.

The court below recognized the fact that these policies were part of the community, however, it refused to include the wife's interest in her gross estate. Implicit throughout the opinion of the lower court is the belief that insurance policies are somehow *sui generis* and the ordinary community property law does not apply. The following quotation from the opinion provides an illuminating example of the erroneous path onto which the court has wandered (R. 48-49):

> This interest which Mrs. Stewart had in the insurance policies was, in effect, a right of protection; a right to upset during her lifetime as to one-half of [sic] the event that the proceeds were paid to a stranger on Mr. Stewart's death without her consent. But this right of protection did not enure to the benefit of anyone on her death since her death extinguished this right. Both before and after her death he had the right to take the cash surrender value of these policies without her consent, because he had the management and control of the community property. It was only

[7] A different result will obtain, of course, where the wife in writing consents to a gift *(Ettlinger v. Connecticut General Life Ins. Co., supra)*, where the third party is named beneficiary for a valuable consideration (*Union Pacific Mutual Life Ins. Co. v. Broderick, supra*), and where the wife, knowing of the gift, fails to object to the insurance company until after the company in good faith paid the proceeds to the third party (*Blethen v. Pacific Mut. Life Ins. Co., supra*).

> the dissipation of the cash surrender value during her lifetime by way of gift which she could prevent.

The local law in no manner supports the above statement. Thus, the cases, not to mention the applicable provisions of the Civil Code, make it clear that the wife's interest in the insurance policies was an interest vested and equal to that of her husband. In other words, she owned one-half of the policies. In the event of a divorce, the wife could properly claim one-half of the cash surrender value of the policies as her property (see, e.g., *Johnston v. Johnston,* 106 C.A. 2d 775, 236 P. 2d 212); her relinquishment of her rights on such insurance has been held valid consideration for an assignment by the husband to her of a mortgage (*Dixon Lumber Co. v. Peacock, supra*); and should she die prior to her husband, her interest in the policies will go to her heirs and not to the heirs of her husband (*Estate of Castagnola, supra;* Cf. *Mayr v. Arana,* 133 C.A. 2d 471, 284 P. 2d 21). Such rights are indeed much more substantial interests in property than a "right of protection." Such rights represent vested ownership interests in property which are not extinguished upon the death of the owner. Additionally, the wife has a clear-cut right of testamentary disposition of her community interest in insurance policies as well as any other type of community property. Probate Code, Section 201, (Appendix A, *infra*), provides that "upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is sub-

ject to the testamentary disposition of the decedent." Had the decedent herein so desired, it would have been completely proper for her to have made testamentary disposition of her share of these twenty-six insurance policies, and under the Probate Code of the State of California, this disposition would have been effective. While the Probate Code does not purport to define the nature of community interests in property (*Trimble v. Trimble, supra*), it does set forth in unequivocal language the right of the decedent to make testamentary disposition of one-half of the community property. This is a general right relating to all community property and it applies to insurance policies in the name of the surviving husband. There is nowhere in the Probate Code an indication of a different rule for insurance policies.

Thus, at the time of her death, the decedent owned one-half of each of these insurance policies. The amount so held is therefore includible in her gross estate. Section 811 of the Internal Revenue Code of 1939 (Appendix A, *infra*) provides as follows:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> (a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;
>
> * * *

Under the clear language of subdivision (a) above, the insurance is includible in decedent's estate to the extent of her interest therein at the time of her death. At the time of her death, she had a one-half interest in the policies and to that extent the policies must be included in the estate. Such is the precise holding of *California Trust Co. v. Riddell, supra,* which correctly applied California law to this situation. See also *Estate of Carroll v. Commissioner,* 29 B.T.A. 11, wherein one-half of the value of Louisiana community property life insurance on the surviving husband's life was included in the estate of decedent wife. The District Court, however, chose to follow a decision based on Washington law and which arose under different provisions of the Internal Revenue Code, *Waechter v. United States,* 98 F. Supp. 960 (W.D. Wash.), affirmed on other grounds, 195 F. 2d 963 (C.A. 9th). The District Court in *Waechter* considered the situation where the decedent wife was beneficiary of three insurance policies taken out by her surviving husband with Washington community funds during her lifetime. The wife's executor included in her estate one-half the cash surrender value of these policies, then sued for refund. It was the position of the Government that the cash surrender value of the policies was community property and that one-half of this was subject to the wife's power of testamentary disposition under the Washington statutes. The decedent in *Waechter* died on February 20, 1947, when the Revenue Act of 1942 was in effect, and Section

811(e)(2)[8] thereof could be interpreted as providing that where a wife predeceased her husband, only so much of the community property was includible in her estate as she had power of testamentary disposition thereover. The holding that the wife's interest in the insurance policies was not includible in her gross estate was based upon a state supreme court decision (*In re Knight's Estate,* 31 Wash. 2d 813, 199 P. 2d 89), which held that in the case of policies payable on the death of an insured, who is the surviving spouse, nothing whatever became payable on the death of the beneficiary, the deceased wife, and that therefore no interest in the policies or in the cash surrender value thereof passes to the heirs of the deceased beneficiary. On appeal the Government admitted that in Washington the insurance interest would not pass by will or inheritance, and urged another ground of recovery. The decision of the District Court was affirmed when this Court refused to allow the Government to argue

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[8]The Internal Revenue Code of 1939, Section 811(e)(2), as amended by Section 402 of the Revenue Act of 1942, c. 619, 56 Stat. 798, provided as follows:

(e) *Joint and Community Interests.*—

* * * *

(2) *Community interests.*—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition.

a point not presented to the lower court. *United States v. Waechter,* 195 F. 2d 963. Thus the question presented in this case has never been decided by this Court.

The community property provisions of the 1942 Act were repealed by Section 351 of the Revenue Act of 1948, c. 168, 62 Stat. 110, effective with respect to estates of decedents dying after December 31, 1947. Since the decedent in the case at bar died in 1951, it is apparent that *Waechter,* based as it was upon the 1942 Act and its requirement of testamentary disposition, has no application. There is presently no requirement of testamentary disposition, although as pointed out above Probate Code Section 201 makes it clear that in California the decedent herein had a right of testamentary disposition. However, mere beneficial ownership at time of death is presently sufficient for estate tax purposes. The estate tax is imposed, not upon the right to succeed to property at death or upon the right to receive property by devise, descent or distribution, but is rather "an excise upon the transfer of an estate upon the death of the owner." *May v. Heiner,* 281 U.S. 238, 244. This Court in *Commissioner v. Clise,* 122 F. 2d 998, carefully examined the nature of the federal excise tax, while specifically considering the includibility of an interest transferred at the time the holder of an annuity policy died. It was stated (pp. 1001-1002):

> The Federal Estate Tax is levied upon the privilege of transmission of property at death. *Saltonstall v. Saltonstall,* 276 U.S. 260, 270, 48 S. Ct.

> 225, 72 L. Ed. 565. It is "death duties," as distinguished from a legacy or succession tax. It does not tax the interest to which the legatees and devisees succeed on death, but the interest which ceased by reason of death; what is imposed is an excise upon the transfer of an estate upon death of the owner. *Nichols v. Coolidge,* 274 U.S. 531, 537, 47 S. Ct. 710, 71 L. Ed. 1184, 52 A.L.R. 1081; *Young Men's Christian Ass'n v. Davis,* 264 U.S. 47, 50, 44 S. Ct. 291, 68 L. Ed. 558; *Edwards v. Slocum,* 264 U.S. 61, 62, 44 S. Ct. 293, 68 L. Ed. 564; *Knowlton v. Moore,* 178 U.S. 41, 47, 49, 20 S. Ct. 747, 44 L. Ed. 969. The Supreme Court, in *Reinecke v. Northern Trust Co.,* 278 U.S. 339, 347, 49 S. Ct. 123, 125, 73 L.Ed. 410, 66 A.L.R. 397, said, "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred." Death is said to be the generating event. *Tyler v. United States,* 281 U.S. 497, 502, 50 S. Ct. 356, 74 L.Ed. 991, 69 A.L.R. 758.

If the lower court was correct in holding that the policies are assets of the community, and it is submitted that this portion of the opinion is correct, then it is apparent that upon the death of the decedent something had to happen to her interest in the policies. Because of her death, she ceased to hold an interest in the policies, and such interest passed to her estate, to her husband or to the beneficiaries of the policies. Such a passing in itself is sufficient to require the policies to be included in decedent's gross estate under Section 811(a) of the Code.

Assuming for the purposes of argument only, however, that the husband's action in investing the community assets in insurance in his name had the effect of making a gift on the part of the wife, either to himself or to the beneficiaries, half of the insurance is still includible in her estate. The California cases relating to gifts of community property made by the husband without the written consent of the wife have generally termed such gifts voidable. See, e.g., *Blethen v. Pacific Mut. Life Ins. Co., supra.*[9] The lower court held that if the wife did not take steps to invalidate such a gift during her lifetime, it became valid upon her death. In other words, the wife's failure to exercise her right to void the gift made it valid. If such be the case, the half interest of the wife is still includible in her gross estate, either under the provisions of Section 811(c)(1)(C) or 811(d) of the Code. Section 811(c)(1)(C) includes in gross estate any interest which a decedent has transferred "intended to take effect in possession or enjoyment at or after his death." If decedent is considered to have made a transfer of her interest in the insurance policies, either to her husband or to the contingent beneficiaries, it is clear that she had a right at least until the time of her death, to recapture such interest.[10] Any

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[9]The cases arose, in the main, in the pre-1927 period when the husband had title to the community property and the interest of the wife was no more than an expectancy. It would appear that as to post-1927 community property, since the wife has an interest equal to that of her husband, any similar gift would be completely void *ab initio.*

[10]Of course, under the Government's view of the law, she had much more than a right of protection, her right extended to dispose of this interest by will under Probate Code Section 201.

transfer, therefore, was one which could not take effect until after her death, and the property so transferred must be included in the estate. Similarly, Section 811(d) includes in gross estate any interests transferred where the enjoyment thereof was subject at the date of death to any change through the exercise of a power to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death. If a voidable gift has been made in this case, it might have been revoked by decedent up until the time of her death within the meaning of Section 811(d). Should it be held, therefore, that the wife's interest in the policies has somehow been divested by the action of the husband herein, the interest is still includible in her gross estate under either Section 811(c)(1)(C) or (d), because at the time of her death she retained the right to void the attempted gift by insurance by her husband. In the posture of the case at bar, however, it would seem more correct under the state cases to hold that at the time of her death the decedent held a half interest in the policies as a vested owner. Such interest would therefore be includible under Section 811(a).

The Supreme Court, in *Lang v. Commissioner,* 304 U.S. 264, held that upon the death of a husband, with a wife surviving, only one-half of the proceeds of his life insurance (purchased with community funds) is includible in his estate. It is therefore only logical that upon the wife's prior death the other one-half interest which she owns should be included in her estate. To hold otherwise would mean that a husband

can purchase life insurance upon his life, with community assets, deplete his wife's estate for the purposes of estate tax in the event that she predecease him, while being assured that only one-half of the proceeds will be included in his estate should he be the first to die. The opinion of the court below in effect allows the taxpayer to eat his cake and have it too. It is incorrect and should be reversed.

II.

THE ANNUITY POLICIES ISSUED TO THE WIFE WERE HER SEPARATE PROPERTY AND THEIR FULL VALUE IS INCLUDIBLE IN HER GROSS ESTATE.

Seven annuity policies were issued to the decedent in 1934 and 1935. (Exs. C, D, E, F.) The premiums on these policies, as the premiums on the husband's insurance policies, were paid with community funds. (R. 29, 40.) Each policy, a written instrument, named the decedent as annuitant. In each the decedent was described as the person having the right to name or change beneficiaries at any time. (R. 39.) She further had the right to make loans up to the amount of the cash surrender value of the policies and could surrender the contracts to the company and receive the cash surrender value thereof. Originally, the husband was designated primary beneficiary of each policy; later changes by decedent substituted the daughter as primary beneficiary. It is the position of the Government that all seven of these annuity policies were the separate property of the decedent and that

consequently their full value is includible in her gross estate under Section 811(a) of the Code.

Generally speaking, in determining the status of property held by husband or wife, the presumption is that it belongs to the community. However, Section 164 of the California Civil Code (Appendix A, *infra*) expressly modifies this rule in certain instances of property held by the wife. The section and its early history are discussed in *Nevins v. Nevins,* 129 C.A. 2d 150, 153, 276 P. 2d 655, as follows:

> From the earliest period of California history courts have adhered to the Spanish law rule accepted in community property states that the presumption attending the possession of property by either a husband or wife is that it belongs to the community. Exceptions to the rule must be proved, and the burden rests with the claimant of the separate estate. (*Meyer v. Kinzer* (1859), 12 Cal. 247 [73 Am. Dec. 538]. *Wilson v. Wilson* (1946), 76 Cal. App. 2d 119 [172 P. 2d 568].)
>
> In 1889, however, by direct statutory change, the foregoing general rule was modified as to properties held in the wife's name. In those situations, according to the addition to Civil Code section 164, where property is acquired during marriage by a married woman by an instrument in writing, the presumption is not that the property is community, but the contrary, that it is separate. (*Armstrong,* California Family Law, pp. 440-441; 10 Cal. Jur. 2d 713.) The burden is then upon the husband seeking to claim the property for the community. (*Dunn v. Mullan,* 211 Cal. 583 [296 P. 604, 77 A.L.R. 1015]; *Pearson*

v. Hellman Commercial etc. Bank, 199 Cal. 305 [249 P. 10].) Originally this portion of Civil Code, section 164, was limited to conveyances of real property (*Stafford v. Martinoni,* 192 Cal. 724 [221 P. 919]; 12 Cal. L. Rev. 421) but a further amendment in 1927 extended its application to acquisition of any interest in or encumbrance on real or personal property. (10 Cal. Jur. 2d 715).

As against the husband, the presumption is disputable, and may be controverted by other evidence, direct or indirect. But the evidence to overthrow the presumption must be "clear and convincing" (*Attebury v. Wayland,* 73 Cal. App. 2d 1, 5 [165 P. 2d 524].)

It can be seen, therefore, that these policies are presumptively the separate property of the decedent, for they are "personal property * * * acquired by a married woman by an instrument in writing." *Estate of Lissner,* 27 C.A. 2d 570, 81 P. 2d 448. This presumption is, of course, disputable and it is susceptible of being overcome by other evidence, but in the absence of such controverting evidence, the court or jury is bound to find in accord with the presumption; for the presumption itself is a form of evidence. *Palmer v. Palmer,* 101 C.A. 2d 819, 226 P. 2d 613; *Stafford v. Martinoni,* 192 Cal. 724, 221 Pac. 919; *Nichols v. Mitchell,* 32 Cal. 2d 598, 197 P. 2d 550. There is nowhere to be found any indication that the husband did not wish decedent to hold these policies as her separate property, and there was no testimony at all as to the intent of the parties at the time the

policies were issued, or indeed, as to their intent at any time during the existence of the policies.

The District Court fell into error by failing to consider the exception carved by Section 164 out of the general rule that property held by husband and wife is presumably community property. Instead, the court mistakenly held that under California law these policies were prima facie community property (R. 40), and then went on to state that there was no substantial evidence in the record that the policies (other than the Fidelity policies) became decedent's separate property by means of a gift from her husband. In addition to ignoring completely the statutory presumption that the policies were separate property (Section 164 was not mentioned in the opinion below), the court also failed to consider the long line of cases concerning transfers by the husband to the wife. These cases hold that if a husband transfers his separate or community property to his wife, the mere fact of transfer raises the prima facie presumption that he intended the transfer to be a gift. *Dunn v. Mullan,* 211 Cal. 583, 589, 296 Pac. 604; *Ballinger v. Ballinger,* 9 Cal. 2d 330, 333, 70 P. 2d 629; *Ayoob v. Ayoob,* 74 C.A. 2d 236, 254, 168 P. 2d 462; *Pasadena Trust etc. Bank v. Bryson,* 46 Cal. App. 730, 733, 189 Pac. 816; *Estate of Horn,* 102 C.A. 2d 635, 228 P. 2d 99. There is no dispute about the fact that the premiums were paid with community funds. Since the husband had the management and control of such community funds (Civil Code Section 172), the funds must have been used with his consent.

In effect, by allowing community funds to be used to pay premiums on policies taken out in the name of the decedent alone, he was transferring the funds to the wife. In such situations the courts have stated that the property became separate property of the wife even without the formality of a written instrument. *Nevins v. Nevins, supra.* Of course, the situation becomes much more clear cut when the property itself is evidenced by a written instrument, as happened in the case at bar. Thus, in the situation at bar there are two presumptions that the property was held by decedent as her separate estate, the first arising because the property interest was acquired by an instrument in writing, and the second arising because the husband who manages and controls the community property transferred the same to his wife.

Life insurance on the wife's life was considered in a husband's suit for a share of the proceeds in *Pacific Mut. Life Ins. Co. v. Cleverdon,* 16 Cal. 2d 788, 108 P. 2d 405. The holding that the beneficiary, and not the husband, took all of the proceeds of the wife's insurance was based upon two grounds. The first of these was that the premiums were paid from the wife's earnings and the parties had informally agreed that these earnings were separate property of the wife. Secondly, the court held that even if the premiums were paid from community funds, they were paid with the knowledge and consent of the husband and he was not entitled to share in the proceeds. In effect, the court was saying that the husband had given his wife his share of the premiums which were paid on the policies.

The court below misconstrued the effect of certain action which was taken with respect to various changes of beneficiaries made by the decedent. The daughter was substituted on each of the policies as primary beneficiary in place of the husband. This substitution was made on the Fidelity policies in 1948, and then in 1950 when the decedent elected to change the mode of payment the husband signed a statement addressed to the insurance company in which he relinquished all his community rights in the policies. (R. 37; Ex. C.) As to these policies the court held that a gift had been made to decedent and that they became her separate property. (R. 44.) Similar action was taken by decedent with respect to each of the other policies. In 1948 the daughter was substituted as primary beneficiary and in 1950 there was an election to change the mode of payment. The husband's acquiescences in these changes of beneficiary were as follows: Hancock policies, the husband signed the form under which the change of beneficiary was requested (R. 38; Ex. D); Equitable policy, husband signed below a line reading: "I hereby agree to the foregoing beneficiary provisions. Signature of Annuitant's husband" (R. 38; Ex. F); Aetna policies, husband signed the request form on the line provided for the signature of "Witness" (R. 39; Ex. E). Discussing the express relinquishment of community rights by the husband in the Fidelity policies, the court below stated (R. 41):

> As to those policies there is no doubt that they were Mrs. Stewart's separate property at the time of her death, but the fact that he saw fit

> not to do the same thing with his interest in the other policies is strong evidence that he did not intend to make a gift of them, but rather intended to retain his community interest.

This statement, it is submitted, places undue emphasis upon the Fidelity Mutual form which the husband signed. The mere fact of signing such a form is not evidence that the husband had a community interest in the policies. The form, it should be noted, states in part as follows (Ex. C):

> I, hereby, relinquish any and all community property rights I may have in said policies and in all payments made or to be made thereunder by your Company, and in all premiums paid or to be paid in connection with said policies; and authorize your Company to deal with said policies as the separate [sic] property of my said wife.

The form, while effective for purposes of relinquishing any community rights which the husband might have had, does not in any manner prove that he had such rights, and indeed there is nowhere in the form any indication that the husband had any community interest in the policies. All that the form stated was that if he had any such rights he was giving them up.

On the other hand, the court apparently gave no consideration at all to the fact that as to three of the remaining five policies the husband gave unqualified assent that the proceeds be paid to a beneficiary other than himself (Hancock and Equitable policies), and on the remaining two policies signed the request for such a change as a "Witness" (Aetna policies).

This Court, in *Ettlinger v. Connecticut General Life Ins. Co.,* 175 F. 2d 870, considered a somewhat comparable situation. In that case the decedent insured and his wife both signed a written request that his daughters be the beneficiaries of his life insurance. After some payments had been made to the daughters, the wife claimed an interest because part of the premiums had been paid with community property. This Court held that an unqualified assent that the proceeds be paid to the daughters was a sufficient consent in writing that the wife was giving up her community interest in the policy to meet the requirements of Civil Code Section 172. If such a consent suffices to deprive the wife of her community interest it must be more than sufficient to deprive a husband of any community interest which he might have in the policies. Although it is felt that under the California law these policies have been the separate property of decedent ever since they were first issued to her, should the Court for some reason reach a contrary decision, it is apparent from the *Ettlinger* case that the policies became separate property of the decedent at the time her husband signed the change of beneficiary forms.

The court below erred in holding that the Hancock, Equitable and Aetna policies were not the separate property of decedent. The full value of all of the policies should be included in decedent's gross estate.

CONCLUSION.

The decision of the court below was incorrect and should be reversed.

Respectfully submitted,

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July, 1958.

(Appendices A and B Follow.)

Appendices.

Appendix A

Civil Code of California:

Sec. 161a. *Community property; interests of parties defined.*

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property. (Added Stats. 1927, c. 265, p. 484, §1.)

Sec. 162. *Separate property; wife.*

SEPARATE PROPERTY OF THE WIFE. All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property. (Enacted 1872.)

Sec. 164. *Community property; presumptions as to property acquired by wife; limitation of actions.*

All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; but whenever any real

or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

* * * (Enacted 1872. As amended Stats. 1889, c. 219, p. 328, §1; Stats. 1893, c. 62, p. 71, §1; Stats. 1897, c. 72, p. 63, §1; Stats. 1917, c. 581, p. 827, §1; Stats. 1923, c. 360, p. 746, §1; Stats. 1927, c. 487, p. 826, §1; Stats. 1935, c. 707, p. 1912, §1; Stats. 1941, c. 455, p. 1752, §1.)

Sec. 172. *Community personal property; management and control; restrictions on disposition.*

The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of

the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife. (Enacted 1872. As amended Stats. 1891, c. 220, p. 425, §1; Stats. 1901, c. 190, p. 598, §1; Stats. 1917, c. 583, p. 829, §1.)

Probate Code of California:

Sec. 201. *Title of surviving spouse; portion subject to testamentary disposition or succession.*

Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse subject to the provisions of sections 202 and 203 of this code. (Stats. 1931, c. 281, p. 595, §201, as amended Stats. 1925, c. 831, p. 2249, §2.)

Internal Revenue Code of 1939:

Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * *

(c) [As amended by Sec. 7(a) of the Act of October 25, 1949, c. 720, 63 Stat. 891] *Transfers*

or personal property, or any interest therein or encumbrance thereon, is acquired by a married woman by an instrument in writing, the presumption is that the same is her separate property, and if acquired by such married woman and any other person the presumption is that she takes the part acquired by her, as tenant in common, unless a different intention is expressed in the instrument; except, that when any of such property is acquired by husband and wife by an instrument in which they are described as husband and wife, unless a different intention is expressed in the instrument, the presumption is that such property is the community property of said husband and wife. The presumptions in this section mentioned are conclusive in favor of any person dealing in good faith and for a valuable consideration with such married woman or her legal representatives or successors in interest, and regardless of any change in her marital status after acquisition of said property.

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Sec. 811. Gross Estate.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) *Decedent's Interest.*—To the extent of the interest therein of the decedent at the time of his death;

* * *

(c) [As amended by Sec. 7(a) of the Act of October 25, 1949, c. 720, 63 Stat. 891] *Transfers*

in Contemplation of, or Taking Effect at, Death—

(1) *General rule.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise—

* * *

(C) intended to take effect in possession or enjoyment at or after his death.

* * *

(3) *Transfers taking effect at death—transfers after October 7, 1949.*—An interest in property transferred by the decedent after October 7, 1949, shall be included in his gross estate under paragraph (1)(C) of this subsection (whether or not the decedent retained any right or interest in the property transferred) if and only if—

(A) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent; * * *

* * *

(d) *Revocable Transfers.*—

(1) *Transfers after June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a

power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

* * *

(3) *Date of existence of power.*—For the purposes of this subsection the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

* * *

(26 U.S.C. 1952 ed., Sec. 811.)

Appendix B

Table of Exhibits

All exhibits filed in this cause were attached to the stipulation of facts. (R. 24-33.) By stipulation of the parties (R. 64), the insurance and annuity policies attached to the stipulation of facts are designated as part of the record on appeal, but are not incorporated in the printed transcript of record. For the convenience of the Court, the following is a list of these policies:

Exhibit	Company	Policy number	Similar policies not of record
	DECEDENT'S ANNUITY POLICIES[11]		
C	Fidelity Mutual	521823	521822
D	John Hancock	0128263	0128280
E	Aetna	AP 1850	AP 1849
F	Equitable	9685846	
	HUSBAND'S INSURANCE[12]		
H	Equitable	2370306	1926372 2249133 1926371 2387397 2387396 2387398 2796071
I	Travelers	409014	409015
J	Pacific Mutual	336749	
K	Mass. Mutual	459078	
L	Aetna	530811	
M	Equitable	9577484	9577482
N	Mutual Life	25198	25197
O	New York Life	123101	
P	New York Life	123837	123838
Q	John Hancock	020695	
R	Mutual Benefit	838189	838190
S	West Coast Life	97457	
T	Aetna	778050	778051

[11]See Ex. B for summary tabulation.
[12]See Ex. G for summary tabulation.